83-1148

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LEO VITTORIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JOSEPH BEELER, Member of the
Bar of the Supreme Court
HOLLY R. SKOLNICK
Joseph Beeler, P.A.
300 Executive Plaza
3050 Biscayne Boulevard
Miami, Florida 33137
(305) 576-3050

QUESTIONS PRESENTED FOR REVIEW

1. Do trial courts deny the accused their Sixth Amendment right to have a jury determine whether the prosecution proved beyond a reasonable doubt each essential element of the alleged crime, when they instruct juries that, as a matter of law, a misstatement of the source of income on an income tax return is a material matter as contemplated by 26 U.S.C. § 7206(1) and, in connection with similar statutes, likewise direct a verdict of guilty on the essential element of materiality?

2. When a trial court erroneously excludes critical defense evidence, thereby violating the Fifth and Sixth Amendment right to present a defense, should an appellate court apply the harmless error standard of Kotteakos v. United States, 328 U.S. 750 (1946) or

the harmless error standard of Chapman v. California, 386 U.S. 18 (1967)?

Table of Contents

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES AND RULES

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LEO VITTORIO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner, LEO VITTORIO, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINION BELOW

The Order and Opinions of the United States Court of Appeals for the Eleventh Circuit are reprinted in the Appendix hereto (APP:1a). No opinion was rendered by the District Court pertaining to the issues herein.

JURISDICTION

The initial judgment of the United States Court of Appeals for the Eleventh Circuit affirming Petitioner's conviction was entered on March 14, 1983. A Petition for Rehearing was timely filed and rehearing was granted. A new Opinion affirming Petitioner's conviction was issued on August 12, 1983. Petitioner's request for rehearing and suggestion for rehearing en banc was denied on October 14, 1983. Upon Petitioner's application, an extension of time to file this Petition was granted, to and including January 12, 1984. This

Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, AND STATUTE INVOLVED

A. Constitutional Provisions.

United States Constitution, Amendment V, in relevant part:

> No person shall . . . be deprived of life, liberty or property, without due process of law; . . . .

United States Constitution, Amendment VI, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to have compulsory proccess for obtaining witnesses in his favor . . . .

B. Statute.

26 U.S.C. § 7206(1):

> Any person who --
> (1) DECLARATION UNDER PENALTIES OF PERJURY -- Willfully makes and subscribes any return, statement or other document, which contains or is verified by a written declaration that it is made under penalties of perjury,

and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition Below

On November 5, 1980, a federal grand jury returned an Indictment charging the Petitioner, LEO VITTORIO, with five offenses. Count 1 charged that Mr. Vittorio conspired to accomplish two illegal goals in violation of 18 U.S.C. § 371. It charged a conspiracy to defraud the United States by impeding, impairing, obstructing and defeating the functions of the Internal Revenue Service and to use the mails to defraud Cement Mason Union Local 780. Counts 2, 3, 4 and 5 each charged that the Petitioner signed under penalty of

perjury a federal income tax return for each of the years 1974, 1975, 1976 and 1977 when he did not believe each return to be true and correct as to every material matter, in violation of 26 U.S.C. § 7206(1).

Petitioner pled not guilty to all counts. After a trial in Miami, Florida, before the Honorable James C. Paine, a jury found the Petitioner guilty on all five counts of the Indictment. The court imposed a sentence of 18 months imprisonment for Count 1. The court withheld the imposition of a sentence of confinement for each of Counts 2, 3, 4 and 5 and placed the Petitioner on probation for a period of five years for each count. The four terms of probation are to run concurrently. The court also imposed a fine of Five Thousand ($5,000.00) Dollars for each of Counts 2, 3, 4 and 5 totaling

Twenty Thousand ($20,000.00) Dollars.

(ii) Statement of Facts

Petitioner is a union cement mason. Union masons have commonly worked in the name of another union mason (referred to as a "stiff") who is not doing mason work at the time. The mason who uses the stiff's name does not declare these wages on federal or state income tax returns and does not pay taxes on this income. This mason may also claim state unemployment benefits without regard for the wages earned under the stiff's name. But income taxes are withheld by the employers and there was no proof in this case that the federal treasury lost any revenue. If the stiff is also a union mason and the employer subscribes to the union's collective bargaining agreement then the union gives the stiff credits towards medical and pension benefits for the hours worked in his name.

A large number of union cement masons in the state of New York worked in the Petitioner's name. At the time the Petitioner was not doing mason work but was in Florida developing restaurants. The masons using Petitioner's name received the income. The employers sent the W-2 forms to the Petitioner and he attached the forms to his tax return.

Angelo Acca was a New York mason and friend of the Petitioner. He was not a co-conspirator. He testified that once in 1974 and once in 1975 the Petitioner telephoned him and asked him to try to stop the New York masons from using Petitioner's name. The trial court excluded as hearsay what the Petitioner told Acca during these conversations.

The government conceded and the Court of Appeals assumed that the exclusion of Petitioner's 1974 and 1975

statements to Acca was error. But even though the trial court's error denied the Petitioner a fundamental right -- the right to present a defense -- the Court of Appeals applied the harmless error standard of Kotteakos v. United States, 328 U.S. 750, 764-65 (1946).

With respect to the criminal tax charges, the trial court instructed the jury that as a matter of law the "misstatement of a source of income on an income tax return" is a material matter for purposes of 26 U.S.C. § 7206(1). Thus, the jury never passed on the issue of materiality before reaching its verdict, nor was the evidence ever tested against the reasonable doubt standard. Relying on precedent from the Fifth Circuit, United States v. Taylor, 574 F.2d 232, 235 (5th Cir.), cert. denied, 439 U.S. 893 (1978), the panel approved this instruction.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED BECAUSE PETITIONER'S CASE PRESENTS ISSUES RELATED TO FEDERAL PRINCIPLES OF OVERRIDING IMPORTANCE: A CRIMINAL DEFENDANT'S RIGHT TO A TRIAL BY JURY AND HIS RIGHT TO A FINDING OF GUILTY BEYOND A REASONABLE DOUBT ON EVERY ELEMENT OF THE OFFENSE CHARGED

Title 26, United States Code, Section 7206(1) is a felony statute which is violated when one willfully makes and subscribes a federal income tax return and does not believe the return to be true and correct as to every material matter. The materiality of the false or incorrect matters is thus an essential element of the offense.

A long line of Supreme Court cases over the last decades has held that the Constitution requires that such essential elements must be submitted to the jury for determination and that the jury

must find that the element was proven beyond a reasonable doubt.

Nevertheless, in the Eleventh Circuit, as in a majority of federal courts, the finding of the existence of materiality under Section 7206(1) is made by the court, rather than by the jury. Further, in the Eleventh Circuit, materiality need not be found beyond a reasonable doubt, but the proof need only meet some lesser standard.

This practice violates constitutional imperatives of the greatest importance -- the right to a jury trial and the right to a reasonable doubt standard.

The Sixth Amendment right to a trial by jury is historically and fundamentally a check on the power of government, including the power of judges. Duncan v. Louisiana, 391 U.S. 145, 156 (1968); accord Ballew v. Georgia, 435

U.S. 223, 229 (1978); Williams v. Florida, 399 U.S. 78, 100 (1970); Baldwin v. New York, 399 U.S. 66 (1970). Removing an essential element of an offense from the jury's consideration effectively usurps the jury's function.

In Baldwin, Mr. Justice White, speaking for the Court, noted that the constitutional allocation of power to the jury rather than to the court represents a "fundamental decision about the exercise of official power." Id. at 72. Justice White went on to note that the Founding Fathers placed particular importance on jury trials to prevent the reality, or even the appearance, of misuse of power by the Government, whether through the executive or its coordinate branch, the judiciary:

> [T]he primary purpose of the jury is to prevent the possibility of oppression by the Government; the jury interposes between the accused and

> his accuser the judgment of laymen who are less tutored perhaps than a judge or a panel of judges, but who at the same time are less likely to appear as but another arm of the Government that has proceeded against him.

Id.; see also id. at 76-77 (Burger, C.J., dissenting) ("The Founding Fathers therefore cast the constitutional provisions we deal with here as limitations on federal power . . . .").

Not only is the accused entitled to have the jury stand between him and his accusers, the Due Process Clause of the Fifth Amendment requires the government to prove each essential element of the crime to the satisfaction of the jury beyond a reasonable doubt. In re Winship, 397 U.S. 375 (1970). This principle has been emphasized repeatedly over the last decade and is stated succinctly in Jackson v. Virginia, 443 U.S. 307 (1979).

> [N]o person shall be made to suffer the onus of a criminal conviction except upon sufficient proof--defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.

Id. at 316 (emphasis added). See also In re Winship, 397 U.S. at 364 (Due Process Clause requires such proof of "every fact necessary to constitute the crime"); Patterson v. New York, 432 U.S. 197, 210 (1976) (Due Process Clause requires the prosecution to prove beyond a reasonable doubt "all of the elements included in the definition of the offense of which the defendant is charged"); Mullaney v. Wilbur, 421 U.S. 684, 702 (1975) (The government "must prove every ingredient of an offense beyond a reasonable doubt . . . ."); Sandstrom v. Montana, 442 U.S. 510, 520 (1978); Connecticut v. Johnson, ___U.S. ___, 103 S.Ct. 969 (1983).

This Court has never decided a case in which the issue of whether "materiality" in a false statement prosecution was properly one for the jury to decide rather than for the court. The only Supreme Court opinion on which the Eleventh Circuit can rest its present practice as to materiality is Sinclair v. United States, 279 U.S. 263 (1929), an opinion which predates (1) Winship, (2) Mullaney, (3) Patterson, (4) Sandstrom, and (6) Johnson. Sinclair concerned the question of a defendant's refusal to answer "pertinent" questions in a congressional committee hearing. In a brief two paragraphs, the Sinclair Court noted a similarity between the concepts of pertinency and materiality and stated that both should be decided by the court. Id. at 298-99.

Petitioner respectfully submits that the dictum in Sinclair has been

overruled sub silentio or at the very least is ripe to be reconsidered in light of the Supreme Court's more recent opinions concerning the right of a defendant to have a jury determine that each essential element of an offense has been proven beyond a reasonable doubt.

While it is a well-established rule of evidence that the judge should determine whether evidence is relevant and material and consequently admissible, an analogous rule with respect to an essential element of a false statement type of offense is not appropriate. The issues are properly distinguishable:

> [M]ateriality as a substantive element of the crime of perjury is something more than materiality considered in an evidentiary ruling by the court. Materiality in such a case becomes a matter for ultimate determination by the decisional process.

People v. Clemente, 285 App. Div. 258, 262, 136 N.Y.S.2d 202, 206 (N.Y. 1954),

aff'd, 309 N.Y. 890, 131 N.E.2d 294 (1954); accord Commonwealth v. McDuffee, 398 N.E.2d 463, 468 (Mass. 1979).

Although lawyers are accustomed to thinking of materiality as a matter for judicial ruling, there is nothing in the nature or quality of materiality which makes it essentially a legal concept.*

II.

CERTIORARI SHOULD BE GRANTED BECAUSE A SUBSTANTIAL FEDERAL QUESTION EXISTS IN PART DUE TO THE SHEER NUMBER OF OFFENSES FOR WHICH MATERIALITY IS AN ESSENTIAL ELEMENT

The "materiality" of a false statement is not an issue limited to prosecutions brought under Section 7206.

---

*Indeed, that the issue of materiality is not by its very nature or of necessity a question of law, is demonstrated by civil cases under federal law in which the jury determines the issue of materiality. See, e.g., Aquionics Acceptance Corporation v. Koller, 563 F.2d 712, 715 (6th Cir. 1976); Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876, 888 (2d Cir. 1972) (materiality issue submitted to the jury in suit for securities fraud under 15 U.S.C. § 78(b)).

Numerous federal statutes prohibit and penalize false statements, misrepresentations, false claims, and other forms of fraud which can be practiced upon federal agencies, courts, and financial institutions.

Many of these statutes, like Section 7206, explicitly require that the "false statement" or other misrepresentation be material. See, e.g., 18 U.S.C. § 1621 (perjury before grand jury); 18 U.S.C. § 1623 (perjury before a court); 18 U.S.C. § 922(a)(6) (false statement in connection with firearms purchase). But even when the statute does not literally require materiality, the federal courts of appeals have read the element of materiality into the offense. See, e.g., United States v. Halbert, 640 F.2d 1000, 1008 (9th Cir. 1981) (materiality essential to mail fraud offense under 18 U.S.C. § 1341);

United States v. Kostoff, 585 F.2d 378 (9th Cir. 1978) (essential to bank fraud offense, 18 U.S.C. § 1014); United States v. Adler, 623 F.2d 1287, 1291 n.5 (8th Cir. 1980) (essential element of both 18 U.S.C. § 1001, governing false statements to government agencies generally, and 18 U.S.C. § 287, governing false claims to federal agencies).

The issue of the "materiality" of alleged false statements is therefore common to many federal prosecutions. Thus, the questions Petitioner raises herein have an importance far beyond his individual case and the statute under which he was convicted. As we demonstrate below, when the circuits have considered these various statutes, they have disagreed as to whether the materiality of the false statement in question is to be decided by the court or the jury.

III.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT THAT EXISTS AMONG THE FEDERAL COURTS OF APPEALS WITH RESPECT TO THE MATERIALITY ELEMENT OF THIS STATUTE AND ALSO WITH RESPECT TO THE MATERIALITY ELEMENT OF OTHER FALSE STATEMENT STATUTES

This issue also merits the consideration of the Supreme Court because it has generated a substantial conflict among the circuits. The Fourth Circuit has recognized that the issue of materiality in a charge of filing false returns is appropriately a jury question. United States v. Null, 415 F.2d 1178, 1181 (4th Cir. 1969). The Eleventh Circuit and several others have taken the contrary position that the issue is one of law for the court to decide. See, e.g., United States v. Gaines, 690 F.2d 849 (11th Cir. 1982); United States v. Haynes, 573 F.2d 236 (5th Cir.), cert. denied, 439 U.S. 893

(1978); United States v. Whyte, 699 F.2d 375 (7th Cir. 1983); United States v. Strand, 617 F.2d 571 (10th Cir.), cert. denied, 449 U.S. 841 (1980); United States v. Romanow, 509 F.2d 26 (1st Cir. 1975). Thus, the problem is sufficiently difficult to divide courts.

The problems created by the concept of materiality are not limited to Section 7206(1). There is also a conflict among the circuits applying the materiality requirement of Title 18, United States Code, Section 1001, which governs false statements to government agencies. The Second, Fourth, Fifth, Sixth, Seventh, Eighth and District of Columbia Circuits have ruled that Section 1001's materiality requirement is a question of law. United States v. Abadi, 706 F.2d 178, 180 (6th Cir.), cert. denied, 34 CrL 4005 (1983); United States v. McIntosh, 655 F.2d 80, 82 (5th

Cir. 1981), cert. denied, 455 U.S. 948 (1982); United States v. Adler, 623 F.2d 1287, 1292 (8th Cir. 1980); United States v. Bernard, 384 F.2d 915, 916 (2d Cir. 1967); United States v. Ivey, 322 F.2d 523, 529 (4th Cir.), cert. denied, 375 U.S. 953 (1963); United States v. Clancy, 276 F.2d 617, 635 (7th Cir. 1960), rev'd on other grounds, 365 U.S. 312 (1961); Weinstock v. United States, 231 F.2d 699, 703 (D.C. Cir. 1956). The Ninth and Tenth Circuits have ruled that this question is one of fact. United States v. Irwin, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); United States v. Valdez, 594 F.2d 725, 729 (9th Cir. 1979).

Courts have treated the materiality requirement in other false statement type statutes differently as well. For example, in a mail fraud prosecution under 18 U.S.C. § 1341, the Ninth Cir-

cuit has held that the issue of materiality should be submitted to the jury. United States v. Halbert, 640 F.2d 1000 (9th Cir. 1981). But the issue of materiality in prosecutions for perjury under 18 U.S.C. § 1623 is usually considered a question for the court. See, e.g., United States v. Brumley, 560 F.2d 1268, 1275, 1278-80 (5th Cir. 1977); United States v. Raineri, 670 F.2d 702, 718 (7th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 446 (1983); United States v. Berardi, 629 F.2d 723, 728 (2d Cir.), cert. denied, 449 U.S. 995 (1980); United States v. Giacalone, 587 F.2d 5 (6th Cir. 1978), cert. denied, 442 U.S. 940 (1979); United States v. Paolicelli, 505 F.2d 971 (4th Cir. 1974).*

*Each circuit court has tended to treat the element of materiality in the same manner no matter what false statement statute is

(Footnote continued on p. 23, infra.)

Thus, as a result of these differing approaches, two distinctly opposite rules now exist with respect to the numerous false statement statutes, all of which should manifestly be governed by a single rule -- one acceptable in all courts and compatible with the Constitution. The confusion can only

---

(Footnote continued from p. 22, supra.) involved. That is, courts which consider materiality a question for the jury in a mail fraud prosecution, also submit it to the jury in other false statement or fraud type trials. See, e.g., United States v. Halbert, 640 F.2d 1000 (9th Cir. 1980) (18 U.S.C. § 1341); United States v. Valdez, 594 F.2d 725 (9th Cir. 1979) (18 U.S.C. § 1001); United States v. Kostoff, 585 F.2d 378 (9th Cir. 1978) (18 U.S.C. § 1014). And courts which have held that the materialty of an allegedly perjurious statement is a question for the court tend to reserve that question to the court in other false statement prosecutions as well. See, e.g., United States v. Scheffer, 600 F.2d 1120, 1123 (5th Cir. 1979).

The Eight Circuit however, represents a notable exception to this tendency. There, materiality is a question for the court in a Section 1623 prosecution, United States v. Armillo, 705 F.2d 939 (8th Cir. 1983), but is a question for the jury in a Section 287 prosecution, United States v. Johnson, 410 F.2d 38 (8th Cir.), cert. denied, 396 U.S. 822 (1969).

further multiply, leading to greater disorder in the law and greater disparity in treatment of defendants across the country, unless the Supreme Court decides the issue and announces a definitive rule.

IV.

CERTIORARI SHOULD BE GRANTED BECAUSE PETITIONER'S CASE ADDRESSES MATTERS OF OVERRIDING IMPORTANCE: THE FUNDAMENTAL RIGHT OF A CRIMINAL DEFENDANT TO PRESENT A DEFENSE AND THE PROPER STANDARD OF REVIEW FOR THE ERRONEOUS EXCLUSION OF DEFENSE EVIDENCE

At trial, Petitioner attempted to introduce into evidence exculpatory statements made by Petitioner to a friend in 1974 and 1975. The witness, who was not a co-conspirator, was not permitted to testify with regard to those conversations, on hearsay grounds. On appeal the government conceded and the Court of Appeals assumed that the exclusion of this testimony was erro-

neous. By wrongfully excluding this evidence, the trial court violated the fundamental Fifth and Sixth Amendment right to present a defense. Nevertheless, the Court of Appeals applied the harmless error standard of Kotteakos v. United States, 328 U.S. 750, 764-65 (1946) on the grounds that the excluded testimony would only have been of limited relevance.

A defendant has a constitution right to offer exculpatory evidence to the jury for its consideration:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms, the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. Just as the accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.

Washington v. Texas, 388 U.S. 14, 19 (1967). See also Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense.").

Where a defendant's constitutional rights are denied the standard of review articulated in Chapman v. California, 386 U.S. 18 (1967) applies, and the burden must shift to the government to prove that the error was harmless beyond a reasonable doubt.

The Court of Appeals refused to apply the Chapman standard to this case involving Petitioner's fundamental right to present a defense. If it had used this standard, the result might well have been different. We therefore urge the Supreme Court to grant certiorari and to make clear the proper standard of review for this and similar cases.*

(Footnote can be found on p. 27, infra.)

V.

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT THAT EXISTS AMONG THE FEDERAL COURTS OF APPEALS WITH RESPECT TO THE STANDARD OF REVIEW TO BE APPLIED WHEN THE TRIAL COURT ERRONEOUSLY EXCLUDES DEFENSE EVIDENCE

There is also a substantial conflict among the circuits regarding the standard of review to be used when defense evidence has been erroneously excluded. Some circuits, recognizing that a defendant has a Sixth Amendment right to present a defense, have treated the improper exclusion of defense evidence as constitutional error, and have therefore used the harmless error standard articulated in Chapman v.

(Footnote from p. 26, supra.)

*The grant of certiorari should also include the question Petitioner has presented complaining of the prosecutor's improper and unfair argument to the jury that the Petitioner did not call a witness who was equally available to the government. This issue is bound up factually and legally with the point concerning the exclusion of exculpatory defense evidence.

California, 386 U.S. 18 (1966). See Hughes v. Matthews, 576 F.2d 1250 (7th Cir. 1978); United States v. Gibson, 675 F.2d 825 (6th Cir.), cert. denied, 103 S.Ct. 305 (1982). Other courts have treated improper exclusion of defense evidence as merely evidentiary error, that is, not of constitutional dimensions, and have applied the standard set forth in Kotteakos v. United States, 328 U.S. 750 (1946). See United States v. Parry, 649 F.2d 292 (5th Cir. Unit B 1981).

The confusion is furthered by the fact that both approaches are sometimes used within the same circuit. See United States v. Morgan, 581 F.2d 933 (D.C. Cir. 1978) (applying Kotteakos) and United States v. Lechoco, 542 F.2d 84 (D.C. Cir. 1976) (applying Chapman); United States v. Opager, 589 F.2d 799 (5th Cir. 1979) (applying Kotteakos) and

United States v. Lay, 644 F.2d 1087 (5th Cir.), cert. denied, 454 U.S. 972 (1981) (applying Chapman).

In several circuits, it is simply not clear what harmless error standard is being used when defense evidence has been erroneously excluded. See United States v. Angelini, 678 F.2d 380, 382 (1st Cir. 1982); United States v. Robinson, 544 F.2d 110, 115 (3d Cir. 1976), cert. denied, 434 U.S. 1050 (1978); United States v. Atkins, 558 F.2d 133, 136 (3d Cir. 1977), cert. denied, 434 U.S. 1071 (1978); United States v. Leake, 642 F.2d 715, 720-21 (4th Cir. 1981); United States v. Roberts, 676 F.2d 1185, 1188 (8th Cir.), cert. denied, 103 S.Ct. 122 (1982); United States v. Wood, 550 F.2d 435. 441 (9th Cir. 1977); United States v. Beery, 678 F.2d 856, 868 (10th Cir. 1982).

Since the application of the

correct standard is essential to judicial review, we have raised an important question of federal law. Since it is a standard of review question, it has broad impact, affecting numerous appeals. Since it has generated severe conflict and confusion among the circuits, the Supreme Court should grant certiorari and clarify which standard is approriate for the review of erroneous exclusions of critical defense evidence.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH BEELER
HOLLY R. SKOLNICK
Joseph Beeler, P.A.
Counsel for Petitioner
300 Executive Plaza
3050 Biscayne Boulevard
Miami, Florida 33137
(305) 576-3050

A P P E N D I X

APPENDIX

Table of Contents

[OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT]

Entered on March 14, 1983 in
Case No. 82-5164
Non-Argument Calendar

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

KRAVITCH, Circuit Judge

Appellant, Leo Vittorio, was convicted under 18 U.S.C. §§ 1341 and 371 of one count of conspiracy to defraud the Internal Revenue Service in collection of taxes and under 26 U.S.C. § 7206(1) of four counts of wilfully subscribing to tax returns which appellant believed were not true and correct. On appeal, appellant raises four bases of reversible error. Finding all four arguments unpersuasive, we affirm.

Appellant is a union member cement mason. An allegedly common practice within the cement masons' union is for unemployed masons to work in the name of other masons who are union members but not currently working in masonry. In this scheme the latter are referred to as "stiffs". The mason using the stiff's name receives tax free income and the stiff, assuming the employer is one who has signed the collective bargaining agreement, receives pension credits and health and welfare benefits.[1]

Vittorio's name was used by several other masons during the 1970's. His federal income tax ret urns for the years 1974-1977 inclusive contained W-2 forms and reflected income that he had not earned. The conspiracy charge and proof thereof were based in significant part on the allegation that appellant

"would provide to conspirators directly and indirectly his name and social security number" and "would falsely declare income earned by conspirators in his income tax return." The substantive charges of violations of 26 U.S.C. § 7206(1) required proof that appellant wilfully filed returns, under penalties of perjury, that he did "not believe to be true and correct as to every material matter . . .." 26 U.S.C. § 7206(1).

At trial, the court excluded as hearsay portions of the testimony by a defense witness, Angelo Acca. Acca's testimony described a 1974 telephone call from Vittorio to Acca, in which appellant allegedly said that he was concerned about the W-2 forms he was receiving in the mail and asked Acca to ask "some of the men to stop using his name."[2] Acca attempted also to testify as to a similar 1975 conversation.

Appellant argues that the testimony would have contradicted the proof that he acted "wilfully," an element necessary to conviction on all counts. He submits that part of the testimony was nonhearsay because not offered to prove the truth of the matter asserted and that the rest of the testimony was admissible under the "state of mind" exception to the hearsay rule. Fed. R. Evid. 803(3).

Appellee concedes that part of the testimony improperly was excluded, in that it was not offered to prove the truth of the matter asserted, but contends that the portion of the testimony conveying appellant's concerns about the W-2's properly was excluded as hearsay. In regard to the latter, the government argues that appellant never argued the state of mind exception in the court below. Furthermore, as to the testimony

that concededly was excluded improperly, no prejudice resulted from the error and, thus, reversal is not warranted.

In relation to the four substantive counts of wilfully filing inaccurate tax returns, any error in the exclusion of the testimony clearly was harmless. All that is required for conviction under § 7206(1) is that the taxpayer wilfully file a tax return he believes to be materially inaccurate. Appellant does not refute that at the time the returns were filed he knew he was reporting income as his which was not his. The excluded testimony goes to the issue of whether or not appellant actively sought to termminate the flow of W-2 forms that he knew not to be his. Even if he did so attempt, the record reveals uncontradicted evidence that appellant thereafter filed the tax returns, knowing that the income reported

therein had been earned by others. The excluded evidence, therefore, was irrelevant to these charges.

As to the conspiracy count, one of the overt acts alleged is the wilful filing of the inaccurate returns. Again, the excluded testimony does not contradict that this act wilfully was done by appellant. Rather the testimony reflects a possible attempt to withdraw from the overall scheme. We note, however, that even after the conversations in question allegedly occurred appellant concededly performed the overt act of filing the returns. Thus, any attempted withdrawal was ineffective. Moreover, appellant failed to assert a withdrawal defense at trial and cannot raise this argument for the first time in appeal as a basis for the objections to the exclusion. Second, appellant does not claim that the testimony was intended

to show that he never entered into the agreement necessary to support a conspiracy charge. Rather he asserts that the testimony would have shown that (1) appellant did not control or cause the actions of those using his name; (2) he did not associate himself with the actions of those using his name; (3) he did not know which masons were using his name; and (4) he attempted to put an end to the illegitimate use of his name.

The law is clear that the existence of an agreement necessary to support a conspiracy conviction may be proved by circumstantial evidence. United States v. Barnes, 681 F.2d 717, 723 (11th Cir. 1982); United States v. Spradlen, 662 F.2d 724, 727 (11th Cir. 1981). Just as clear is the fact that "[t]he defendant need not have knowledge of all the details of the conspiracy; proof is required only that he knew of

the essential objective of the conspiracy." United States v. Barnes, 681 F.2d at 723; United States v. Tamargo, 672 F.2d 887, 889 (11th Cir. 1982). Thus, proof that the defendant was not in control of, did not associate directly with, or did not know the names of alleged coconspirators does not refute the evidence in the record that appellant knew of the objective of the scheme and had agreed to participate. We can say, therefore, "with[] fair assurance, . . . that the judgment was not substantially swayed by the error . . .." Kotteakos v. United States, 328 U.S. 750, 764-65 (1946). See also United States v. Phillips, 664 F.2d 971, 1027 n.84 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 2964 (1982); United States v. Rodriquez, 573 F.2d 330, 333 (5th Cir. 1978); United States v. Rubin, 559 F.2d 975, 984-85 & n.8 (5th Cir.

1977), remanded on other grounds, 439 U.S. 810 (1978).[3]

Witness Acca allegedly contacted an individual in response to appellant's 1974 telephone call to Acca. Appellant's second claim is that the prosecutor's reference during closing argument to appellant's failure to call as a witness the individual that Acca allegedly contacted was prejudicial and reversible error. Appellant objected to the reference at trial on the ground that Acca's testimony had been ruled inadmissible. He did not object on the basis that the reference was prejudicial.[4] The ground for appellant's objection proffered at trial is unavailing as Acca's testimony had been allowed to the extent of Acca's own actions and thus the prosecutor's evidence was relevant to that testimony. Because the other ground or objection is raised for

the first time on appeal, reversible error will be found only if it rises to the level of plain error. United States v. Pool, 660 F.2d 547, 559 n.4 (5th Cir. Unit B 1981)[5]; United States v. Fox, 613 F.2d 99, 101 (5th Cir. 1980); United States v. Haynes, 573 F.2d 236, 241 n.8 (5th Cir.), cert. denied, 439 U.S. 850 (1978). While the reference by the prosecutor may have been improper[6] it does not rise to the level of plain error. Even if appellant conclusively had proven that he had asked Acca to make the call to this individual and that the call was in fact made, no material element of the substantive counts or the conspiracy count would have been negated. In United States v. Gibson, 593 F.2d 7 (5th Cir. 1979), improper references to the failure to call an alibi witness did not rise to the level of plain error in light of the

overwhelming evidence of defendant's guilt. Similarly here, as a matter of law, the "defense" asserted by appellant could not have shielded him from criminal liability on the offense charged. Therefore, the prosecutor's remark bearing upon that defense was harmless. Cf. United States v. Smith, 591 F.2d 1105, 1110-12 (5th Cir. 1979) (prosecutor's comment on failure of potential witness to testify was error where it struck at the heart of the defense).

Unquestionably the reference by the prosecutor to the appellant's failure to call this individual as a witness was error. See United States v. Smith, 591 F.2d 1105, 1110-12 (5th Cir. 1979) (prosecutor's comment on failure of potential witness to testify was error where it struck at the heart of the defense).

Appellant's third and fourth arguments require little discussion. He asserts that his counsel was ineffective in not raising a statute of limitations defense. Where ineffective assistance claims have not been raised in the trial court, they may not be raised for the first time on direct appeal but must be asserted, if at all, on collateral attack. United States v. Barham, 666 F.2d 521, 524 (11th Cir.), cert. denied, ___ U.S. ___, 102 S.Ct. 2015 (1982); United States v. Stephens, 609 F.2d 230, 234 (5th Cir. 1980). This rule exists because facts are to be developed at the trial court level, not by appellate courts unsuited to the task. United States v. Barham supra, 666 F.2d at 524.

Appellant's last claim is that the trial court erred in instructing the jury that, as a matter of law, appellant's false statements on the tax

returns were "material" within the meaning of 26 U.S.C. § 7206(1). Appellant concedes that under the law in this circuit, as established by the precedents of the former Fifth Circuit, materiality under § 7206(1) is an issue of law to be decided by the court. United States v. Taylor, 574 F.2d 232, 235 (5th Cir.) cert. denied, 439 U.S. 893 (1978); United States v. Haynes, 573 F.2d 236 (5th Cir. 1978). However, he asks us to overrule these precedents in favor of a rule that the question of materiality should be submitted to the jury. Cf. United States v. Null, 415 F.2d 1178, 1181 (4th Cir. 1969) (issue of whether items omitted from return were de minimis submitted to jury). This we decline to do. Accordingly there was no error in the trial court's instruction to the jury that appellant's false statements were material.

Having determined that none of appellant's claims of error compel reversal, we AFFIRM the judgment below.

[FOOTNOTES TO OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT]

Entered on March 14, 1983 in
Case No. 82-5164
Non-Argument Calendar

1. Although the stiff reporting the income normally would be liable for income taxes due thereon, in this case the record reflects that appellant was no longer working regularly as a mason but was operating 'Bagel Nosh' restaurant and deductions for business losses incurred in the bagel business offset any tax liability.

2. Trial Record at 566-67.

3. The Eleventh Circuit, in the en banc decision Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) adopted as precedent the decisions of the former

Fifth Circuit rendered prior to October 1, 1981.

Certainly where the excluded testimoney was only tangentially relevant, if at all, to the dispositive issues of existence of an agreement and overt acts in furtherance thereof, no error of constitutional magnitude is presented by the exclusion of the testimony. Cf. Green v. Georgia, 442 U.S. 95 (1979) (exclusion of hearsay testimony in sentencing proceeding resulting in death penalty held violative of due process); Chambers v. Mississippi, 410 U.S. 284 (1973) (cumulative effect of several erroneous evidentiary rulings and exclusion of hearsay testimony going directly to guilt violates due process). Accordingly, we decline reasonable doubt as is necessary when error of constitutional dimension is presented. See United

States v. Phillips, supra, 664 F.2d at 1027 n. 84.

4. Trial Record at 688.

5. In Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982), this circuit has adopted as precedent all decisions of Unit B of the former Fifth Circuit.

6. The reference is not protected from being improper by apellee's assertion that the witness who had not been questioned was "peculiarly within the power" of appellant. McClanahan v. United States, 230 F.2d 919, 925 (5th Cir.), cert. denied, 352 U.S. 824 (1956). The witness was equally available to both parties as is evidenced by the fact that the prosecution did call him to the stand. In any event, our analysis allows us to assume arguendo, without deciding, that the reference was improper.

[JUDGMENT ON REHEARING OF UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT]

Entered on August 12, 1983 in
Case No. 82-5164
Non-Argument Calendar

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

This cause came on to be heard on defendant-appellant's petition for re-hearing;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the opinion and judgment originally entered by this Court is withdrawn; and the judgment of the said District Court is hereby AFFIRMED.

August 12, 1983

[OPINION ON PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT]

Entered on August 12, 1983 in Case No. 82-5164

Non-Argument Calendar

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

KRAVITCH, Circuit Judge

The panel having considered appellant's motion for rehearing, said motion is granted. The original panel opinion of March 14, 1983, is withdrawn and the following substituted as the new opinion.

Appellant, Leo Vittorio, was convicted under 18 U.S.C. §§ 1341 and 371 of one count of conspiracy to defraud the Internal Revenue Service in collection of taxes and under 26 U.S.C. §

7206(1) of four counts of willfully subscribing to tax returns which appellant believed were not true and correct. On appeal, Vittorio raises four bases of reversible error. Finding all four arguments unpersuasive, we affirm.

Appellant is a union member cement mason. An allegedly common practice within the cement masons' union is for unemployed masons to work in the name of other masons who are union members but not currently working in masonry. In this scheme the latter are referred to as "stiffs." The mason using the stiff's name receives tax free income and the stiff, assuming the employer is one who has signed the collective bargaining agreement, receives pension credits and health and welfare benefits.[1]

Vittorio's name was used by several other masons during the 1970's.

His federal income tax returns for the years 1974-1977 inclusive contained W-2 forms and reflected income that he had not earned. The conspiracy charge and proof thereof were based in significant part on the allegation that appellant "would provide to conspirators directly and indirectly his name and social security number" and "would falsely declare income earned by conspirators in his income tax return." The substantive charges of violation of 26 U.S.C. § 7206(1) required proof that appellant willfully filed returns, under penalties of perjury, that he did "not believe to be true and correct as to every material matter . . .." 26 U.S.C. § 7206(1).

At trial, the court excluded as hearsay portions of the testimony of a defense witness, Angelo Acca. Acca's testimony described a 1974 telephone call from Vittorio to Acca, in which

appellant allegedly indicated his concern about the W-2 forms he was receiving in the mail and asked Acca to ask "some of the men . . . to stop using his name."[2] Acca attempted also to testify as to a similar 1975 conversation. The court allowed the testimony to the extent that the telephone calls from appellant to Acca were made, and that Acca thereafter told other masons they should not be using appellant's name "because of the problem he was having with all the W-2 Forms coming in."[3] Acca's testimony that ultimately was struck was the contents of appellant's direct statements to Acca, particularly that appellant asked Acca to get in touch with some of the men and that Vittorio was concerned about the W-2 forms.

Appellant argues that neither component of this evidence was hearsay and therefore all was improperly struck.

Appellee concedes that the testimony about appellant's request for Acca to contact some of the men was improperly excluded as hearsay, but argues that the testimony that appellant was "concerned" is hearsay because offered to prove the truth of the matter asserted. Appellant says that even this latter testimony was not hearsay (1) because it merely conveyed Acca's characterization of the conversation or (2) because it was not offered for its truth but was circumstantial evidence of an innocent state of mind. Alternatively, appellant contends that even if it was hearsay it is inadmissible under the state of mind exception to the hearsay rules. Fed. R.Evid. 803(3).

Even assuming for these purposes that all of the struck testimony was excluded erroneously and was nonhearsay, we can say "with[] fair assurance, . . .

that the judgment was not substantially swayed by the error . . .," Kotteakos v. United States, 328 U.S. 750, 764-65 (1946), and therefore any error was harmless. See United States v. Phillips, 664 F.2d 971, 1027 n.84 (5th Cir. 1981), cert. denied, ___ U.S. ___, 102 S.Ct. 2965 (1982); United States v. Rodriquez, 573 F.2d 330, 333 (5th Cir. 1978); United States v. Rubin, 559 F.2d 975, 984-5 & n.8 (5th Cir. 1977), remanded on other grounds, 439 U.S 810 (1978).[4]

First we emphasize tht contrary to the representations made by appellant, the jury was not instructed to disregard Acca's testimony that he received telephone calls from Vittorio or that Acca thereafter told other masons that they should not be using Vittorio's name. This testimony conveys the message that Vittorio was worried,

wished the use of his name to stop and that Acca was acting in response to Vittorio's telephone calls.

In relation to the four substantive counts of willfully filing inaccurate returns, any error in the striking of the testimony clearly was harmless. All that is required for conviction under § 7206(1) is that the taxpayer willfully file a tax return he believes to be materially inaccurate. "[W]illfulness in this context simply means a voluntary, intentional violation of a known legal duty." United States v. Pomponio, 429 U.S. 10, 97 S.Ct. 22, 24 (1976).

The record reveals uncontradicted evidence that even after the telephone calls to Acca, appellant intentionally filed tax returns, reporting income as his that he knew was not his. Even if, as appellant alleges in his petition for rehearing, he believed that once the W-2

forms were received in his name they should be filed with his return and not ignored, the legal duty at issue here is to file an accurate return. Knowledge of that legal duty is attested to by each and every taxpayer who signs and files a tax return. Concern for the influx of the W-2 forms and an attempt to stop their flow have no bearing on appellant's subsequent intentional violation of the known legal duty to file an accurate return. Even if they had some remote, circumstantial bearing, the testimony of Acca that was not excluded substantially conveys the same message as the struck testimony so that the exclusion was harmless.

As to the conspiracy count, one of the overt acts alleged was the willful filing of the inaccurate returns. Again, the excluded testimony is irrelevant to whether this willful filing

occurred. Appellant asserts that the relevance and the harm flowing from the exclusion of the evidence is in relation to his contention that he never entered into an agreement necessary to support a conspiracy conviction.[5] It borders on the ridiculous to consider, given Acca's admitted testimony, that any jury faced with the evidence of appellant's willful filing of the inaccurate returns, his knowledge of whom to contact to attempt to stop the flow of W-2 forms, and the testimony of his wife that "[w]e were fully aware that his name had to be running wild in New York," and that they did not call the union to stop the flow of W-2's because "that would have caused a lot of trouble for a lot of people,"[6] would have entertained an otherwise non-existent reasonable doubt about the appellant's participation in a conspiratorial agreement if only they had been

allowed to consider the substance of the telephone calls to Acca. The jury was allowed to consider the testimony that Vittorio made the telephone calls and that Acca thereafter took action to stop the flow of forms. The jury nevertheless convicted appellant.

The law is clear that the existence of an agreement necessary to support a conspiracy conviction may be proved by circumstantial evidence. United States v. Barnes, 681 F.2d 717, 723 (11th Cir. 1982); United States v. Spradlen, 662 F.2d 724, 727 (11th Cir. 1981). Just as clear is the fact that "[t]he defendant need not have knowledge of all the details of the conspiracy; proof is required only that he knew of the essential objective of the conspiracy." United States v. Barnes, 681 F.2d at 723; United States v. Tamargo, 672 F.2d 887, 889 (11th Cir. 1982). We can

say with "fair assurance" that if the jury convicted Vittorio on the evidence before it, the exclusion of these bits of testimony did not substantially contribute to that decision. Kotteakos v. United States, 328 U.S. 750, 764-65 (1946). Any error in excluding the testimony was harmless.

Witness Acca allegedly contacted an individual in response to appellant's 1974 telephone call to Acca. Appellant's second claim is that the prosecutor's reference during closing argument to appellant's failure to call as a witness the individual that Acca allegedly contacted was prejudicial and reversible error. Appellant objected to the reference at trial on the ground that Acca's testimony had been ruled inadmissible. He did not object on the basis that the reference was prejudicial.[7] The ground for appellant's objec-

tion proffered at trial is unavailing as Acca's testimony had been allowed to the extent of Acca's own actions and thus the prosecutor's argument was relevant to that testimony. Because the ground of prejudice is raised for the first time on appeal, reversible error will be found only if it rises to the level of plain error. United States v. Pool, 660 F.2d 547, 559 n.4 (5th Cir. Unit B 1981);[8] United States v. Fox, 613 F.2d 99, 101 (5th Cir. 1980); United States v. Haynes, 573 F.2d 236, 241 n.8 (5th Cir.), cert. denied, 439 U.S. 850 (1978).

Unquestionably the reference by the prosecutor to the appellant's failure to call this individual as a witness was error. See United States v. Smith, 591 F.2d 1105, 1110-12 (5th Cir. 1979) (prosecutor's comment on failure of potential witness to testify was

error where it struck at the heart of the defense). Furthermore, the reference is not protected from being improper by appellee's assertion that the witness who had not been questioned was "peculiarly within the power" of appellant. McClanahan v. United States, 230 F.2d 919, 925 (5th Cir.), cert. denied, 352 U.S. 824 (1956). See also United States v. Parr, 516 F.2d 458, 471 (5th Cir. 1975). The witness was equally available to both parties as is evidenced by the fact that the prosecution did call him to the stand.

We conclude, however, that the improper references did not rise to the level of plain error. United States v. Gibson, 593 F.2d 7 (5th Cir. 1979) (improper references to the failure to call an alibi witness did not rise to the level of plain error in light of overwhelming evidence of guilt). "The

[plain error] rule is to be invoked only in exceptional circumstances to avoid a miscarriage of justice." Eaton v. United States, 398 F.2d 485-486 (5th Cir.), cert. denied, ___ U.S. ___, 89 S.Ct. 299 (1968). Given the weight of the evidence and our judgment that even if appellant conclusively had proven that Acca had made the disputed contact the evidence still would have been sufficient to convict,[9] regardless of whether the jury would have convicted, "[w]e cannot say that [appellant was] denied a fair trial." Id. Accordingly, the reference did not rise to the level of plain error.

Appellant's third and fourth arguments require little discussion. He asserts that his counsel was ineffective in not raising a statute of limitations defense. Where ineffective assistance claims have not been raised in the trial

court, they may not be raised for the first time on direct appeal but must be asserted, if at all, on collateral attack. United States v. Barham, 666 F.2d 521, 524 (11th Cir.), cert. denied, ___ U.S. ___, 102 S.Ct. 2015 (1982); United States v. Stephens, 609 F.2d 230, 234 (5th Cir. 1980). This rule exists because facts are to be developed at the trial court level, not by appellate courts unsuited to the task. United States v. Barham supra, 666 F.2d at 524.

Appellant's last claim is that the trial court erred in instructing the jury that, as a matter of law, appellant's false statements on the tax returns were "material" within the meaning of 26 U.S.C. § 7206(1). Appellant concedes that under the law in this circuit, as established by the precedents of the former Fifth Circuit, materiality under § 7206(1) is an issue

of law to be decided by the court. United States v. Taylor, 574 F.2d 232, 235 (5th Cir.) cert. denied, 439 U.S. 893 (1978); United States v. Haynes, 573 F.2d 236 (5th Cir. 1978). However, he asks us to overrule these precedents in favor of a rule that the question of materiality should be submitted to the jury. Cf. United States v. Hull, 415 F.2d 1178, 1181 (4th Cir. 1969) (issue of whether items omitted from return were material submitted to jury). This we decline to do. Accordingly there was no error in the trial court's instruction to the jury that appellant's false statements were material.

Having determined that none of appellant's claims of error compel reversal, we AFFIRM the judgment below.

[FOOTNOTES TO OPINION ON PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT]

Entered on August 12, 1983 in
Case No. 82-5164
Non-Argument Calendar

1. Although the stiff reporting the income normally would be liable for income taxes due thereon, in this case the record reflects that appellant was no longer working regularly as a mason but was operating a restaurant and deductions for business losses incurred in the business offset any tax liability.

2. Trial Record at 566-67.

3. Trial Record at 567-68.

4. The Eleventh Circuit, in the en banc decision Bonner v. City of Prichard, 661

F.2d 1206, 1209 (11th Cir. 1981) adopted as precedent the decisions of the former Fifth Circuit rendered prior to October 1, 1981.

Certainly where the excluded testimoney was only tangentially relevant, if at all, to the dispositive issues of existence of an agreement and overt acts in furtherance thereof, no error of constitutional magnitude is presented by the exclusion of the testimony. Cf. Green v. Georgia, 442 U.S. 95 (1979) (exclusion of hearsay testimony in sentencing proceeding resulting in death penalty held violative of due process); Chambers v. Mississippi, 410 U.S. 284 (1973) (cumulative effect of several erroneous evidentiary rulings and exclusion of hearsay testimony doing directly to guilt violates due process). Accordingly, we decline to require the government to prove harmlessness beyond a

reasonable doubt as is necessary when error of constitutional dimension is presented. See United States v. Phillips, supra, 664 F.2d at 1027 n. 84. As appellees point out in their response to the petition for rehearing, to extend the "constitutional" harmless error standard to this type of case would be to apply it to every erroneous evidentiary ruling.

5. Appellant also makes the argument that but for this evidentiary ruling he may have offered withdrawal from the conspiracy as a defense. No indication of a desire to make such an argument was made at trial and no objection to the striking of this testimony was made on this basis. Appellant cannot now proffer a potential defense that was never made at trial as evidence of prejudice from the trial court's ruling.

6. Trial Record at 606-07.

7. Trial Record at 688.

8. In Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982), this circuit has adopted as precedent all decisions of Unit B of the former Fifth Circuit.

9. This is particularly true given the absence of any proffered withdrawal defense. See note 5 supra.

[ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT]

Entered on October 14, 1983 in Case No. 82-5164

Before HILL, KRAVITCH and HENDERSON, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

* * *

* * *

ENTERED FOR THE COURT:

_____

United States Circuit Judge